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June 27, 2011

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423

RE: **Finance Docket No. 35517, *CF Industries, Inc. v. Indiana & Ohio Railway Company, Point Comfort and Northern Railway Company, and Michigan Shore Railroad, Inc.***

Dear Ms. Brown:

Enclosed for e-filing by the Indiana & Ohio Railway Company, Point Comfort and Northern Railway Company, and Michigan Shore Railroad, Inc. is the Reply to Edison Electric Institute.

Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,

Louis E. Gitomer
Attorney for Indiana & Ohio Railway Company,
Point Comfort and Northern Railway Company, and
Michigan Shore Railroad, Inc.

Enclosure

BEFORE THE

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35517

CF INDUSTRIES, INC.

v.

INDIANA & OHIO RAILWAY COMPANY, POINT COMFORT AND NORTHERN RAILWAY COMPANY, AND MICHIGAN SHORE RAILROAD, INC.

REPLY OF INDIANA & OHIO RAILWAY COMPANY, POINT COMFORT AND NORTHERN RAILWAY COMPANY, AND MICHIGAN SHORE RAILROAD, INC. TO EDISON ELECTRIC INSTITUTE'S *AMICUS* LETTER

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Dated: June 27, 2011

BEFORE THE

SURFACE TRANSPORTATION BOARD

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The Indiana & Ohio Railway Company ("IORY"), the Point Comfort and Northern Railway Company ("PCN"), and the Michigan Shore Railroad, Inc. ("MSR") (collectively "the Railroads"), pursuant to 49 C.F.R. §1104.13(a), request the Surface Transportation Board ("Board") deny Edison Electric Institute's ("EEI") request for leave to file the *amicus* letter as an improper petition to intervene that will broaden the scope of the proceeding and expand the timeframe of this proceeding.

EEI filed the *amicus* letter on June 7, 2011, to argue that the burden of proof in this proceeding must rest with the Railroads because of the opinion in *Consolidated Rail Corp. v. Interstate Commerce Comm'n*, 646 F.2d 642 (D.C. Cir. 1981) ("*Conrail*"). EEI seeks leave to file the *amicus* letter under 49 C.F.R. §§1104.3 and 1117.

EEI's position is wrong procedurally and substantively.

1. EEI should be denied leave to file the *amicus* letter on procedural grounds and the *amicus* letter should be stricken from the record.

The Board has no procedure for the acceptance of an *amicus* letter because EEI is not a proper party to this proceeding. Nonetheless, EEI uses the *amicus* letter in an attempt to urges the Board to accept an argument without basis, the impact of which would be to turn the clock back to the law as it existed before the Staggers Act and impose a substantial burden on the Railroads. Without being a party and without justification, EEI seeks to have the Board require the Railroads, all Class III carriers, to engage in lengthy and costly studies before making changes for the handling of hazardous commodities. In short, EEI would have the Board declare that operating expertise and management discretion must be replaced with time consuming studies conducted by hired consultants. EEI has not sought to become a party that would subject itself to the Board's jurisdiction or a proper party's most reasonable and relevant requests for additional or supporting information, nor has EEI even demonstrated the relevance or materiality in the *amicus* letter to the instant proceeding. Indeed, EEI seems to be using this proceeding in order to engage in a collateral attack on the Board's ruling in *Arkansas Electric Cooperative Corporation—Petition for Declaratory Order*, Docket No. FD 35305 (STB served March 3, 2011), where Board granted the relief sought by the shippers, but determined that *Conrail* was not controlling (Petition at 4, footnote 3).

Therefore, because the Board does have procedures for parties to intervene and participate in a proceeding, the Railroads ask the Board to treat EEI's *amicus* letter as a petition for leave to intervene under 49 C.F.R. §1112.4, and deny the relief sought because, as explained further below, EEI's intervention will unduly broaden the issues in this proceeding and unduly disrupt any schedule adopted by the Board.

In the Petition for Declaratory Order filed on May 17, 2011, by CFI Industries, Inc. ("CFI"), CFI at least claimed to use the service provided by the Railroads and to ship Toxic Inhalation Hazards and Poison Inhalation Hazards ("TIH/PIH") over the Railroads. EEI claims that:

> **Some** EEI members use anhydrous ammonia for pollution-control purposes at coal-fired power plants, and use railroads to transport it **in many instances.** Also, **some** EEI members use chlorine at nuclear plants, and **some** of that chlorine has moved by rail. (emphasis added)

Petition at 2. EEI does not indicate whether the few members involved with anhydrous ammonia and chlorine are located in the United States, use rail service, and in particular use the rail service of the Railroads. Indeed, the *amicus* letter seems to make clear that EEI's actual concern is with the transportation of nuclear materials. EEI equates nuclear materials with hazardous materials, even though the transportation of nuclear materials is regulated by the Nuclear Regulatory Commission (the "NRC") in addition to the Federal Railroad Administration (the "FRA").

EEI's participation in this proceeding would impermissibly broaden the scope of this proceeding to include a different type of shipper, a different commodity type, and potentially additional railroads. Further evidence of the broadening of issues in this proceeding resulting from EEI's filing has already occurred in the impermissible reply-to-reply filed by CFI on June 20, 2011, where CFI seeks to clarify the Petition for Declaratory Order that it filed along the lines suggested in the *amicus* letter.

Not only has EEI failed to follow the proper procedure before the Board, but even had EEI sought leave to intervene, as demonstrated above, EEI would not have met the standards for intervention.

Therefore the Railroads respectfully request the Board to strike the *amicus* letter from the record, or in the alternative to deny the request of EEI for leave to file the *amicus* letter and to strike the *amicus* letter from the record.

2. The interpretation of Conrail posited by EEI is substantively wrong.

EEI's *amicus* letter asks the Board to hold that the railroads bear the burden of proof regarding the appropriateness of safety related measures unless they are in congruent compliance with the FRA Rules. For this theory, EEI relies on *Conrail* and the same erroneous partial quotation used by CFI from *Granite State Concrete Co., Inc. v. Boston and Maine Corporation and Springfield Terminal Railway Company*, STB Docket No. 42083 (STB served September 15, 2003) ("*Granite State*"). See Reply of Indiana & Ohio Railway Company, Point Comfort and Northern Railway Company, and Michigan Shore Railroad, Inc. at 10 filed on June 6, 2011.

EEI confuses a non-binding PowerPoint presentation, that is not incorporated into (1) IORY Tariff 0900 issued by the IORY on May 6, 2011; (2) PCN Tariff 0900 issued by the PCN on May 6, 2011; and (3) MSR Tariff 0900 issued by the MSR on May 6, 2011[1], with the Tariffs. Moreover, the specific language in the Tariffs does not provide a factual basis for EEI's assumptions.

A. FRA permits local restrictions.

The Board has acknowledged that the primary jurisdiction for rail safety matters is delegated to the FRA. But the Board has recognized that it also "has responsibility for promoting a safe rail transportation system." *See Granite State.* FRA and the Pipeline and Hazardous Materials Safety Administration ("PHMSA") are the primary agencies responsible for safety regulation regarding the transportation of TIH/PIH. FRA though a memorandum of

[1] Collectively IORY Tariff 0900, PCN Tariff 0900, and MSR Tariff 0900 are referred to as the "Tariffs."

understanding with the PHMSA is responsible for enforcing the regulations set out in 49 C.F.R. Part 174 (the "Rules"). Under this regulatory scheme railroads may impose local restrictions on their lines. 49 C.F.R. §174.20

The Railroads are not asking the Board to impose additional safety conditions on the shipper beyond the requirements of the FRA. Under the Rules enforced by the FRA, the Railroads may impose additional safety conditions on its own. Unlike in *Conrail*, the Rules specifically provide for additional safety measures "[w]hen local conditions make the acceptance, transportation, or delivery of hazardous materials unusually hazardous, local restrictions may be imposed by the carrier " 49 CFR §174.20(a). Class II and III railroads, with their limited resources, as a general rule, incur local conditions that are different than the conditions on Class I railroads. Whether it is because a short line may not operate seven days per week, a mechanical inspector may not be available all day every day, or any other conditions that exist on short lines but not Class I railroads, these conditions can make the acceptance, transportation, or delivery of hazardous materials unusually hazardous. Thus, the Railroads may impose additional restrictions based on local conditions as long as it reports those conditions.[2]

It is clear from the language of 49 CFR §174.20 (a) that the Rules are not exhaustive, but leave room for private industry to supplement the regulations based on line specific concerns.[3] The need for additional restrictions are at the discretion of the railroads and the states.

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[2] The requirement for imposition of stricter conditions is that the rail carrier report to the Bureau of Explosives for publication the "full information as to any restrictions which it imposes against the acceptance, delivery, or transportation of hazardous materials, over any portion of its lines...." 49 CFR §174.20(b).

[3] State government is also able to supplement the Rules. 49 CFR §174.2.

B. The burden of proof is on the complainants.

(i) *EEI's reliance on Conrail is not supported by the facts.*

Generally, complaintants carry the burden of proof when claiming an unreasonable practice. *See North American Freight Car Association, et al. v. BNSF Railway Company*, STB Docket No. 42060 (Sub-No. 1) (STB served January 26, 2007) ("*North American*"). EEI's creative attempts to show a basis for doing so does not establish a need to diverge from that general rule here.

There are significant distinctions between the tariffs addressed in *Conrail* and the Tariffs. First, the tariffs in Conrail were subject to regulation by FRA and the NRC. The Tariffs are not subject to regulation by the NRC. *Conrail* arose under a pre-Staggers Act provision that expressly put the burden of proof on the carrier that proposed a rate or practice change that was suspended or investigated before it became effective. See 49 U.S.C. 10707(e) (1980). Unlike this petition for declaratory order or a complaint proceeding, *Conrail* involved tariffs filed in response to an Interstate Commerce Commission investigation, thus the statutory scheme demanded that the railroad carry the burden of proof.[4] The decision in *Trainload* occurred nearly six months before the Staggers Act became law and was governed by pre-Staggers Act law.

EEI maintains that under *Conrail* the railroad must show that the additional safety measures are necessary. In *Conrail*, the railroads were asking for additional regulations not required under the regulatory scheme. Unlike in *Conrail*, the Railroads are not asking the Board to impose additional safety measures beyond what the FRA allows. The Railroads are simply

[4] *See Trainload Rates on Radioactive Materials, Eastern R.R.*, 362 I.C.C. 756, 757 (April 11, 1980) ("*Trainload*").

exercising their authority under the Rules. Therefore, even if the Staggers Act had not shifted the burden of proof to the shipper, *Conrail* would not control in this case.

(ii) *The Board has previously declined to follow Conrail.*

The Board has also determined that it has discretion as to whether to follow *Conrail*. See *North American*, where the Board stated:

> [T]he *Conrail* decision was premised on facts not present here and on a statutory scheme predating the Staggers Act. In any event, in section 10702, Congress did not limit the Board to a single test or standard for determining whether a rule or practice is reasonable; instead, it gave the Board "broad discretion to conduct case-by-case fact-specific inquiries to give meaning to those terms, which are not self-defining, in the wide variety of factual circumstances encountered."

After addressing the *North American* burden of proof in proceedings involving whether a practice is reasonable, the Board reaffirmed its adherence to *North American* when it stated: "Whether a particular practice is unreasonable depends upon the facts and circumstances of the case. The Board gauges the reasonableness of a practice by analyzing what it views as the most appropriate factors." *Arkansas Electric Cooperative Corporation—Petition for Declaratory Order*, Docket No. FD 35305 (STB served March 3, 2011) at 5.

The Railroads request the Board to adhere to the *North American* ruling.

Conclusion

The Railroads respectfully request that the Board strike the *amicus* letter or in the alternative to deny EEI's request for leave to file the *amicus* letter as an improper petition to intervene. The Railroads also respectfully request that the Board disregard the untenable arguments in the *amicus* letter that the Railroads may not, under the Rules, impose additional restrictions and have the burden of proof in this proceeding.

Respectfully submitted,

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Dated: June 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served electronically and by first class mail postage pre-paid on

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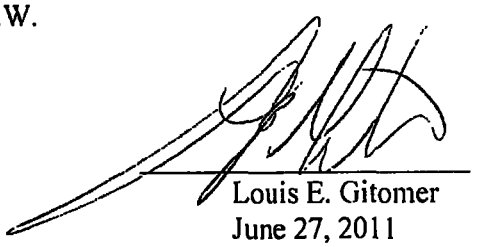

Louis E. Gitomer
June 27, 2011